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CUMULATIVE DIGEST

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§36-1

Generally

People v. Murphy, 2013 IL App (2d) 120068 (No. 2-12-0068, 9/27/13)

1. In **People v. Carter**, 213 Ill. 2d 295, 821 N.E.2d 233 (2004), the Illinois Supreme Court held that the unlawful possession of a weapon statute was ambiguous concerning whether the simultaneous possession of multiple firearms and ammunition could support multiple convictions. Applying the rule of lenity, which provides that ambiguities in a criminal statute must be resolved in the defendant's favor, the court concluded that the "allowable unit of prosecution" in such a case consists of the entire transaction. Thus, the simultaneous possession of weapons and/or ammunition constitutes only a single offense and will support only one conviction.

In **People v. McSwain**, 2012 IL App (4th) 110619, the Fourth District applied the same rationale to the simultaneous possession of multiple pornographic images of a single child, and held that such possession will support only one conviction for child pornography.

2. Here, the court distinguished **McSwain** where the defendant possessed a thumb drive which contained 15 pornographic images of several different children. The court concluded that the rule of lenity does not require courts to construe statutes so rigidly as to defeat legislative intent. The court concluded that by enacting the aggravated child pornography statute, the legislature intended to protect children from exploitation by eliminating the market for such materials. Because that legislative intent would be undermined if the possession of multiple images of child pornography constitutes only a single offense no matter how many children are portrayed, the court concluded that possession of pornographic images of multiple children support multiple convictions.

3. The court added that it questioned the validity of **McSwain** even for possession of multiple images of a single child, because having what is in effect a "volume discount" for images of a single child might increase the demand for such images and result in continued exploitation of that child. The court declined to consider whether **McSwain** was properly decided, however, finding that defendant's simultaneous possession of images of multiple children supports convictions for 15 counts of aggravated child pornography.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

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§36-2

Illinois Statutes

People v. Hollins, 2012 IL 112754 (No. 112754, 6/21/12)

The Illinois Supreme Court upheld the conviction of defendant for child pornography against due process and equal protection challenges.

The 32-year-old defendant and his 17-year-old girlfriend were college students who engaged in legal consensual sex. Defendant used his cell phone to take extreme closeup photographs of the couple's genitals. At her request, defendant emailed the photos to his girlfriend. They were discovered when her mother accessed her account. While defendant did not violate any law when he had sexual intercourse with his girlfriend, his recording of that

act violated the child pornography statute, which sets 18 as the age at which a person may be legally photographed engaging in sexually explicit conduct. 720 ILCS 5/11-20.1(a)(1).

1. Defendant conceded that his case did not implicate a fundamental right, and therefore the test for determining whether the statute complies with substantive due process is the rational-basis test. A statute will be upheld under this test so long as it bears a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable.

The court rejected defendant's argument that the application of the child pornography statute to persons old enough to consent to the private sexual activity they have chosen to photograph does not serve the statute's purpose, which is to prevent the sexual abuse and exploitation of children. The State's legitimate interest in protecting the psychological welfare of children is served by having a higher age threshold for appearance in pornography than to consent to sexual activity. The dangers of appearing in pornography are not as readily apparent as the concrete dangers of sexual activity and can be more subtle. Regardless of the intentions of the parties, there is no guarantee that private photographic images will always remain private.

2. The statute does not criminalize wholly innocent conduct. The conduct underlying the recording was legal but the recording was not.

3. Even though the Illinois Constitution provides greater privacy protections than the federal constitution, defendant's claim is not cognizable under the privacy clause of the Illinois Constitution. Ill. Const. 1970, Art. I, §6. Privacy claims in the context of criminal prosecutions have only been recognized where the government or its agents intrude on the privacy of the defendant. The mere fact that the recording of the sex act took place in private, rather than in public, does not implicate the privacy clause.

4. Because the pornography statute is clear and definite, and defendant's ignorance of the statute is no defense, the court rejected defendant's argument that the anomaly between the pornography statute and the sexual assault statute prevented him from having fair notice that his conduct in photographing the legal sex act was criminal.

5. When the legislature raised the age limit of the pornography statute to 18, it did not express any concerns about 17-year-olds not being able to appreciate the subtle dangers of memorializing sexual activity. Its motivation was to aid law enforcement in the prosecution of child pornography. A law will be upheld if there is any conceivable basis for finding a rational relationship to a legitimate legislative purpose, even if that purpose did not in fact motivate the legislative action. Moreover, the desire to aid law enforcement is also rationally related to a legitimate legislative purpose.

6. Defendant's equal protections challenges are rejected for the same reasons as his due process challenges, as those claims are also subject to a rational-basis analysis.

Burke, J., joined by Freeman, J., dissented. The case should be rebriefed to address the effect of the "holding" of **United States v. Stevens**, 559 U.S. ___, 130 S. Ct. 1577 (2010), that "child pornography, for purposes of the first amendment, exists only if it is 'an integral part of conduct in violation of a valid criminal statute.'"

(Defendant was represented by Assistant Defender Kathleen Hamill, Elgin.)

People v. Knebel, 407 Ill.App.3d 1058, 946 N.E.2d 920 (2d Dist. 2011)

1. Defendant was charged with possession of child pornography under 720 ILCS 5/11-20.1(a)(1)(vii) for possessing a photograph "involving a lewd exhibition of the . . . genitals, pubic area [or] buttocks" of a child under the age of 18. In determining whether a photograph is "lewd," courts consider several factors, including: (1) whether the focal point of the visual depiction is on the child's genitals; (2) whether the setting of the visual depiction is sexually

suggestive; (3) whether the child is depicted in an unnatural pose or in inappropriate attire considering his or her age; (4) whether the child is fully or partially clothed, or nude; (5) whether the visual depiction suggests sexual coyness or a willingness to engage in sexual activity; and (6) whether the visual depiction is intended to elicit a sexual response in the viewer.

A finding that a photograph is lewd does not require that each factor be present; the photograph is to be judged in light of its overall content, taking into consideration the age of the child. Whether a photograph is “lewd” is determined *de novo*.

2. The court concluded that all six factors supported a finding that the photograph at issue, which portrayed a young girl lying naked on a bed, was “lewd.” Defendant’s conviction was affirmed.

(Defendant was represented by Panel Attorney Jerry Bishoff, Chicago.)

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3. The court added that it questioned the validity of **McSwain** even for possession of multiple images of a single child, because having what is in effect a “volume discount” for images of a single child might increase the demand for such images and result in continued exploitation of that child. The court declined to consider whether **McSwain** was properly decided, however, finding that defendant’s simultaneous possession of images of multiple children supports convictions for 15 counts of aggravated child pornography.

(Defendant was represented by Assistant Defender Kerry Goettsch, Elgin.)

People v. Rivera, 409 Ill.App.3d 122, 947 N.E.2d 819 (1st Dist. 2011)

A person commits the offense of child pornography where “with knowledge of the nature or content thereof, [he] possesses any film, videotape, photograph or other similar visual reproduction or depiction by computer of any child . . . whom the person knows or reasonably should know to be under the age of 18 . . . , engaged in any activity described in subparagraphs (i) through (vii) of paragraph (1) of this subsection.” 720 ILCS 5/11-20.1(a)(6).

Images and videos speak for themselves in determining whether such media constitutes child pornography. A trier of fact can determine the age of a child from a photograph.

Defendant was convicted of child pornography based on his possession of a compact disc labeled “Jose’s stuff” containing a video clip depicting a female performing oral sex on a male. A State’s Attorney investigator, who the parties stipulated was an expert in the area of computer forensic analysis, testified that the video was labeled “13-year-old give head” and depicted “a young adolescent,” “small in stature,” with “underdeveloped breasts” performing fellatio.

The Appellate Court noted that the State’s witness was not an expert in any field that would allow him to determine the age of an individual in the video clip. Contrary to his testimony, the female in the video was not obviously adolescent or juvenile in appearance. She was depicted in the video fully clothed wearing a sweater and bra, and only her shoulders, face and right hand were visible during the act of fellatio, so nothing indicated that her breasts were underdeveloped. Also contrary to the investigator’s testimony, nothing in the file name of the disc referred the age of the female. The disc was numbered 13 in a group of consecutively-numbered videos and photographs, and thus that number was not an apparent reference to the age of the person depicted therein. The literal file name was “13givehead” rather than “13-year-old gives head.”

The court acknowledged the great deference ordinarily accorded to jury determinations. Where the evidence at issue does not involve credibility determinations or observations of demeanor, the deference afforded is logically less. Because a simple viewing of the video clip itself created a reasonable doubt of defendant’s guilt, the court reversed the conviction. It also directed that the video not be shown at defendant’s retrial on sexual assault charges.

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